

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

L4-5, and unspecified internal derangement of the left knee. Appellant underwent low back and left knee surgery and received compensation for temporary total disability on the periodic rolls.

Medical evidence showed that appellant could not return to his regular duties as a correctional officer but that he could perform sedentary duty eight hours a day. A rehabilitation counselor reviewed his work history, education, training and restrictions and performed a transferable skills analysis. After identifying suitable jobs, including that of customer service representative, he developed a job search plan for a 50-mile radius of appellant's hometown of Spring Hill, Florida. Labor market statistics showed 29,650 customer service representative positions in the Hernando-Pasco-Hillsborough-Pinellas County area with an entry-level wage of \$11.47 an hour.

After placement efforts ended, OWCP's rehabilitation specialist advised that appellant's résumé showed his capacity to work in a sedentary job as a customer service representative. He added that appellant had taken two short-term training classes that provided him with current computer skills necessary for the successful performance of sedentary office jobs in his commuting area.

On August 25, 2010 OWCP issued a notice of proposed reduction in appellant's wage-loss compensation. It found that the position of customer service representative was medically and vocationally suitable for him.

Appellant informed OWCP that he began work as a full-time long-term substitute teacher earning \$12.40 per hour. He explained that the position was only available until such time that a long-term substitute was not needed for class reduction size. Appellant showed how much he was expected to earn each month "as long as I am employed." He was hopeful that he would be able to pick up a long-term substitution position again in September 2011, otherwise he would be unemployed.

Appellant further stated that he was unable to obtain a customer service representative job during placement efforts: "I applied for jobs similar to this one and was denied or not even considered due to [my] lack of experience in the field." He felt that the classes he recently took did not qualify him as a viable candidate for employment in that field.

In a decision dated September 29, 2010, OWCP found that appellant's actual earnings as a substitute teacher did not fairly and reasonably represent his wage-earning capacity. The position was not permanent, he would be employed only part of the year, and the position was considered "light" employment and therefore not consistent with his permanent restriction to sedentary duty. OWCP found that appellant did have the capacity to earn wages as a customer service representative. The medical evidence supported that he was able to perform such sedentary duty, and although he did not find a job during vocational placement efforts, a recent labor market survey supported that the job was being performed in sufficient numbers so as to be considered available in his commuting area.

On appeal, appellant questions why the market survey was not conducted closer to his residence. He notes that Tampa is 40 to 50 miles away, and the Suncoast Parkway Toll Road would cost \$150.00 a month plus gas. Appellant requests detailed information on the basis for

selecting a customer service representative job, and he asks whether other positions were considered in closer proximity to his residence.

### **LEGAL PRECEDENT**

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.<sup>2</sup> “Disability” means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.<sup>3</sup>

In determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment, and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.<sup>4</sup>

When OWCP makes a medical determination of partial disability and of the specific work restrictions, it should refer the employee’s case to an OWCP wage-earning capacity specialist for selection of a position, listed in the Department of Labor’s *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits the employee’s capabilities in light of his physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in the *Shadrick* decision will show the percentage of the employee’s loss of wage-earning capacity.<sup>5</sup>

A position determined to be the goal of a training plan is assumed to represent the employee’s earning capacity if it is suitable and performed in sufficient numbers so as to be reasonably available, whether or not the employee is placed in such a position.<sup>6</sup>

### **ANALYSIS**

The medical evidence established that appellant’s November 29, 2007 employment injury no longer totally disabled him for work. He could not return to his date-of-injury position as a correctional officer, but he could perform sedentary duty on a full-time basis. OWCP was

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<sup>2</sup> 5 U.S.C. § 8102(a).

<sup>3</sup> 20 C.F.R. § 10.5(f).

<sup>4</sup> 5 U.S.C. § 8115(a)

<sup>5</sup> *Hattie Drummond*, 39 ECAB 904 (1988); see *Albert C. Shadrick*, 5 ECAB 376 (1953).

<sup>6</sup> 20 C.F.R. § 10.520.

therefore required to determine the compensation to which he was entitled for his partial disability.

The wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity. Appellant began work as a long-term full-time substitute teacher earning \$12.40 per hour. OWCP found, however, that actual earnings as a substitute teacher did not fairly and reasonably represent his wage-earning capacity because the position was not permanent, year-long or consistent with his permanent medical restrictions.

When actual earnings do not fairly and reasonably represent an employee's wage-earning capacity, OWCP must determine wage-earning capacity as appears reasonable under the circumstances.<sup>7</sup> OWCP referred appellant to a vocational rehabilitation expert, who reviewed his work history, education, training and restrictions and who performed a transferable skills analysis. The rehabilitation counselor identified several suitable positions, including the position of customer service representative. Appellant took two training classes that provided him with current computer skills necessary for the successful performance of sedentary office jobs. The record supported that the selected position of customer service representative was medically suited to his physical restrictions and vocationally suited to his history, education and training. Further, a labor market survey showed nearly 30,000 such jobs from the county of appellant's residence down to Tampa and St. Petersburg. The survey also confirmed an entry-level wage of \$11.47 an hour, or \$458.80 a week.

The Board finds that OWCP properly determined appellant's wage-earning capacity as appears reasonable under the circumstances. The evidence showed that he was capable of performing such sedentary duty, and a labor market survey supported that such positions were performed in sufficient numbers within his commuting area so as to be considered reasonably available to him, regardless of whether he was able to secure a similar position during the period of the job search. OWCP followed standard procedures in reducing appellant's compensation for wage loss by his capacity to earn wages in the open labor market. The Board will therefore affirm OWCP's September 29, 2010 decision.

Appellant argues that Tampa is up to 50 miles from his residence and that commuting costs would exceed \$150.00 a month, but that is the extreme case. OWCP is not requiring him to find a job on the outskirts of his commuting area. The labor market survey of available positions included appellant's home county and the counties extending toward and including the Tampa-St. Petersburg Metropolitan Area.<sup>8</sup>

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<sup>7</sup> See *T.O.*, 58 ECAB 377 (2007) (when the claimant's actual earnings did not fairly and reasonably represent his wage-earning capacity, OWCP reduced his compensation based on his ability to earn wages in a selected position, which the Board affirmed).

<sup>8</sup> Compare *Lawrence D. Price*, 54 ECAB 590 (2003), in which the claimant argued that his commute would be about 120 miles round-trip, which he considered excessive, and that the commuting costs would almost equal the expected earnings of the selected position. The Board found, however, that OWCP properly relied on the rehabilitation specialist's expertise in determining that the constructed position was reasonably available within the claimant's commuting area. It was noted that the labor market surveyed was the nearest viable labor market.

Appellant asks about the basis for the selected position and whether other positions were considered closer to his residence. As noted earlier, the vocational rehabilitation expert identified several suitable positions after reviewing appellant's history, education, training and restrictions and after performing a transferable skills analysis. OWCP selected one that was widely available to appellant within his commuting area, but to be clear, OWCP does not require appellant to work as a customer service representative. Appellant is free to work any job he can find, anywhere he can find one, as he demonstrated when he began work as a long-term substitute teacher. The selection of a suitable position that is reasonably available merely stands as a proxy for his capacity to earn wages in the open labor market; it gives OWCP a basis for adjusting his compensation from total disability to partial disability as appears reasonable under the circumstances.

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant has the capacity to earn entry-level wages as a customer service representative in the open labor market.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the September 29, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 20, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board